Filed 3/1/19 Marriage of Grace & Thompson CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of CYNTHIA L. GRACE and RICHARD L. THOMPSON.	
CYNTHIA L. GRACE, Respondent, v. RICHARD L. THOMPSON, Appellant.	A150045 (Contra Costa County Super. Ct. No. D15-00654)

After their marriage, appellant Richard L. Thompson and respondent Cynthia L. Grace executed a series of documents which, among other things, revoked their premarital agreement and transmuted Thompson's separate property into community property. Thompson challenges the trial court's enforcement and interpretation of these post-marital documents during dissolution proceedings, claiming they were procured through undue influence and he did not, in any event, waive his right to reimbursement. While we affirm the trial court's determination that the documents were not procured through undue influence, we conclude Thompson did not waive his right to reimbursement. We therefore reverse and remand for further proceedings on statutory reimbursement.

BACKGROUND

In March 2002, Thompson and Grace executed a premarital agreement. Both had been previously married, and both had children from their prior marriages. The

premarital agreement, in pertinent part, specified that the $252,000 down payment Thompson provided towards the purchase of the marital home (Lafayette home), Thompson's IRA, and certain bank accounts and annuities owned by Thompson would remain his separate property. The agreement included schedules itemizing each of the party's separate assets. It also specifically provided with respect to the down payment for the Lafayette home that in the event of Thompson's death "the sum of $252,000.00, which represents the down payment used to purchase this parcel, is the separate property of RICHARD L. THOMPSON, but that any increase in equity from the date of purchase is to be shared equally by [t]he Parties to this agreement, or their heirs."

Two months later, in May, Thompson and Grace entered into a joint venture agreement specifying they each owned a one-half interest in the Lafayette home as tenants-in-common. The joint venture agreement also stated it was "to be construed and interpreted and implemented in conjunction with a previously executed Pre-Marital Agreement."

Grace subsequently moved into the Lafayette home, and the couple lived together without marrying until early 2005, at which point they separated for four months. Before reconciling, Thompson and Grace made plans to revoke their premarital agreement and "eliminate" their individual trusts.

Thompson and Grace married on August 1, 2005.

Eighteen days later, they executed several documents prepared by the same attorney who had prepared their premarital and joint venture agreements, William Massarweh. These new documents (the "2005 documents") revoked the premarital agreement, revoked the joint venture agreement, revoked their separate trusts, converted all their property into community property, and transferred the community property into a joint revocable living trust.

The revocation of the premarital agreement read as follows: "We, Richard L. Thompson and Cynthia L. Grace, prior to our marriage, executed and entered into a Premarital Agreement dated March 29, 2002, wherein we defined and agreed to the separate property characterization of our respective assets. [¶] Pursuant to California

Community Property laws, now as husband and wife we wish to revoke the terms of that agreement, and do hereby revoke or terminate the Premarital Agreement by our mutual consent. [¶] Now therefore, pursuant to California law allowing married couples to re-characterize their assets at any time by mutual agreement during their marriage, we do hereby revoke, in its entirety, the Premarital Agreement dated May 9, 2003, and I now hold the former assets contained in that Premarital free and discharged of all the terms and provisions contained in such agreement and are no longer considered as Separate Property. [¶] As such, we now agree by mutual consent as husband and wife that all of our assets we now possess, or will acquire in the future, are characterized as Community Property." (Capitalization omitted.) The document was signed by both Thompson and Grace, and their signatures were notarized by Massarweh.

The property transmutation agreement stated in part: "Husband and Wife established an estate plan using a Revocable Living Trust and companion Pour-Over Wills, and they wish to convert all such joint tenancy property that will be or has been transferred to their Revocable Living Trust into community property prior to such transfer." Several schedules were attached, including schedule B "Separate Property of Husband Trustor" and schedule C "Separate Property of the Wife Trustor." Both of these schedules were signed by Thompson and Grace and both were blank.

Ten years later, on February 5, 2015, Grace filed a petition for dissolution of marriage. In July, she filed a request for a determination that the 2005 documents had validly transmuted the property from separate to community property.

Thompson claimed the 2005 documents were unenforceable due to his personal circumstances at the time they were executed. Thompson declared he was drinking "heavily" at that time, and this "negatively impacted" his life, including his "ability to process information rationally." While the couple were reconciling, Grace told him she "wanted to 'make everything legal,' " to get married, and for them to "revoke [their] individual trusts and create a joint trust." However, he did not "interpret her suggestion as a request to fully join [their] estates or transfer property between one another that was not already co-owned." Nor he declared, did he transmute his separate property to

community property "via the execution of any of the Parties' estate planning documents." Pointing out several errors in the documents, he claimed they had been prepared by "problematic legal counsel."[1] In short, Thompson maintained Grace had breached her spousal fiduciary duties and exerted undue influence over him.

Following a short cause hearing in September, the trial court (Judge Weil) found the "Revocation of Premarital Agreement executed by the Parties on August 19, 2005 constitutes a valid transmutation on its face of the separate property of the Parties to community property pursuant to Family Code section 852 with respect to the items that are identified or covered by the Premarital Agreement executed by the Parties on March 29, 2002." The court then set a long cause hearing on whether Thompson's signature on the transmutation agreement "was procured via undue influence."

In pretrial briefing, Thompson stated he met attorney Massarweh through Grace and that Massarweh had been Grace's attorney in the past. He also detailed the extent of his alcohol addiction, including that he unsuccessfully tried to remain sober in 2005 when the post-marital documents were executed. He asserted the transmutation agreement was (1) not made voluntarily as Grace imposed "isolation upon him" and this resulted in "him being depressed, lonely, anxious, fearful and grieving," which in turn "subverted his free will" and (2) not made with full knowledge because Grace "insisted" the couple use her attorney, Massarweh, and he "did not have an opportunity to ascertain [the] full facts regarding the transaction" having signed all of the 2005 documents "within 60–90 minutes." Thompson therefore claimed he did not have a complete understanding of the documents due to his alcoholism and because he was "not afforded the opportunity to

[1] Thompson noted the revocation of the premarital agreement "incorrectly" listed the date of the premarital agreement as May 9, 2003, whereas the actual date was March 29, 2002. Grace, in turn, noted the revocation of the joint venture agreement "mistakenly" listed the date of the joint venture agreement as May 9, 2003, whereas the actual date of the agreement was May 9, 2002 (although it was executed and notarized on May 8, 2002).

consider the agreement over any period of time" and "was not advised to seek independent counsel."

During the two-day hearing that commenced in March 2016, Thompson testified that after retiring as Senior Vice President of purchasing for Nestle, he started his own consulting business. He believed he had "been an alcoholic since prior to 2001." During the parties' four-month separation, Grace had called to reconcile on the condition they " 'get married and make everything legal.' " According to Thompson, Grace wanted to "eliminate the pre-nuptial agreement," "eliminate our individual trust . . . so that the kids are protected in case something happens to us and for the tax benefits," and keep the fact that they were getting married "a secret." Thompson claimed he was "in a really bad place," and "probably would have agreed to just about anything." He thought when he signed the 2005 document in regard to his trust that the trust "would just be canceled out," and it "wouldn't be relevant anymore."

Grace testified Thompson continued "to operate his [consulting] business on a regular basis," including at the time the 2005 documents were signed. She did not recall anything "notable" when asked if she "observe[d] any impairment" in Thompson's daily ability to function. She thought Thompson understood the 2005 documents and did not observe any "reluctan[ce]" on his part in signing them. According to Grace, Massarweh "went through each document" with the parties. She also testified that throughout the marriage the parties always treated "all of the assets as jointly owned assets." She acknowledged, however, that in 2008, she "attempt[ed] to segregate [her] premarital assets." She claimed she did so only because of her son's disabilities and that she had discussed the matter with Thompson.

Massarweh had "no recollection whatsoever about any of the documents [he had] prepared" for the parties. He could not recall whether he had "general procedures that [he] follow[s] as a matter of course when the parties that come to [him] . . . are not independently represented." He also could not remember which party he represented first or if he even represented "one of them before" he represented the other.

Thompson's grandson testified he had lived with Thompson since he was four years old, and Grace moved in with them when he was 13 years old. He described Thompson as having "a pretty bad alcohol problem" when Grace separated from him in 2005. After Grace left, Thompson's drinking escalated, and Thompson was depressed and "[m]entally not . . . there." Thompson's behavior was "[e]rratic" and "[t]emperamental," and Thompson did not "have the greatest memory of" conversations the two had. Thompson "always had a drink in his land [*sic*]," both "[d]ay and night."

At the end of the hearing, the trial court (Judge Mockler) reiterated that the 2005 documents "very clearly . . . transmuted separate property that the two individuals had back in 2002/2003 into community property to be ultimately put into a Richard Thompson and . . . Cynthia Grace Family Trust."

As to Thompson's claim of undue influence, the court ruled that while "[t]here is no question . . . Grace has benefited hugely by those documents being signed," Thompson had not been unduly influenced when he signed them.

In so ruling, the court observed that, "Yes, there was plenty of testimony during the course of this trial that Mr. Thompson was—I'll put it in my terms—a raging alcoholic. But that doesn't mean that he was incapable of making decisions or that he did not know what he was doing on August 19th . . . of 2005; and in fact, the e-mails, other correspondence, between Mr. Thompson and Mr. Massarweh at the time belie any notion that Mr. Thompson did not understand what was going on."[2] Thus, while "[r]espondent

---

[2] One of the e-mails, dated July 24, 2005, was sent to "Bill" Massarweh from "Dick and Cindy," asking about eliminating the prenuptial agreement and for advice on certain assets. It stated, in part: "Our main goal is to remove all separation of assets, position each other as the primary party responsible for the decisions of our children in the event of our individual deaths, and to provide 'iron clad' management of our assets by assigned parties in the event of our concurrent deaths." Thompson claimed he had not sent this e-mail.

The correspondence included two handwritten notes listing the parties' assets and successor trustees. One of these was in Thompson's handwriting. That note was sent to Massarwerh and asked if Thompson's IRA would "Stay out of trust." Thompson testified

may have been drinking all day, every day as was [his] testimony," "he was still able to function. He was also able to engage in some work and to obtain payment for his services during that period of time." The court filed a written ruling memorializing its findings on April 11, 2016.

A month and a half later, at a June hearing, the court (Judge Mockler) addressed the issue of whether Thompson waived his right to reimbursement for the down payment on the Lafayette home and other assets. Thompson claimed the "case law is very clear that the act of waiver has to be intentional" and asserted the 2005 documents did not contain "the specific intentional language required by Family Code section 2640." The trial court ruled Thompson waived any right to reimbursement when he signed the 2005 documents.

The parties then executed a memorandum of agreement as to all remaining issues,[3] and a judgment of dissolution was filed on November 23, 2016.

DISCUSSION

Undue Influence

Thompson takes issue with the ruling against him on his claim that Grace breached spousal fiduciary duties and exerted undue influence in connection with the 2005 documents.

As Thompson points out, even if a transmutation agreement complies with the requirements of Family Code section 852,[4] it is still subject to examination for undue influence under section 721, subdivision (b).[5]

---

that Massarweh replied "yes, he'd make sure that it was kept out of the list of community property that we created on the 29th on the same day as the trust."

[3] The memorandum states it may be set aside in whole or in part depending on the outcome on this appeal.

[4] All further statutory references are to the Family Code unless otherwise indicated.

[5] Section 852 states, in pertinent part: "A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely

Section 721, subdivision (b) provides: "[I]n transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." "As a consequence, when any interspousal transaction advantages one spouse to the disadvantage of the other, the presumption arises that such transaction was the result of undue influence." (*In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996.)

Here, the trial court found "the result of the [2005 documents] has been extremely unfair" to Thompson, while Grace, in turn, "benefited hugely by those documents being signed." Accordingly, there is no question that a presumption arose that the 2005 documents were procured through undue influence.

As Grace therefore acknowledges, she bore the burden of establishing that Thompson's " ' "action 'was freely and voluntarily made, with full knowledge of all the facts, and with complete understanding of the effect of' the transaction." ' " (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 344, quoting *In re Marriage of Lund* (2009) 174 Cal.App.4th 40, 55.) "The advantaged spouse must show, by a preponderance of evidence, that his or her advantage was not gained in violation of the fiduciary relationship." (*Fossum*, at p. 344.) Grace maintains, however, that there is

---

affected." (§ 852, subd. (a).) As recited above, both judges who heard this matter found that the 2005 documents complied with these statutory requirements. While Thompson, in his opening brief, seems to question this finding in passing—stating, "[i]t is unclear why the first [j]udge jumped to the conclusion in 2015 that a valid transmutation had occurred without hearing all of the evidence" and he is "concerned that the second [j]udge felt bound by the prior ruling of the first [j]udge in the case" —he has not separately challenged the statutory validity of the court's transmutation finding or provided any analysis or record or case citations in support of such an assertion. The issue has therefore been waived on appeal. (See *In re Marriage of Brandes* (2015) 239 Cal.App.4th 1461, 1481 [" ' "Appellate briefs must provide argument and legal authority for the positions taken. 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' " ' "].)

"ample evidence to support the trial court's conclusion that [she] did not exert undue influence over Mr. Thompson." Thompson, in turn, contends otherwise.

" ' "The question of 'whether the spouse gaining an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence.' " ' " (*Fossum, supra*, 192 Cal.App.4th at p. 344.) As the appellant, it is Thompson's burden to show that no substantial evidence supports the trial court's ruling against him, and this is so, regardless of the fact that, in the trial court, Grace had the burden of overcoming the presumption of undue influence. (See *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 368 ["Where the appellant challenges the sufficiency of the evidence, the reviewing court must start with the presumption that the record contains evidence sufficient to support the judgment; it is appellant's burden to demonstrate otherwise."].)

Thompson focuses on various aspects of the evidence.

He first focuses on the evidence of his alcoholism. He asserts there was abundant evidence he drank daily and Grace was fully aware of his addiction, shown, for example, by an e-mail she sent his daughter in 2008, stating his "alcohol abuse is a foundation issue that continues to permeate everything in our lives." In the same e-mail, Grace revealed she had completed a year of study that included diagnosis and treatment of alcohol abuse issues.

According to Thompson, because of his alcoholism, his "recollection of events back at the time the 2005 [d]ocuments were signed is cloudy." To bolster his claim that he was "not in the proper frame of mind to understand the 2005 documents," he points to the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, which states people who abuse alcohol "suffer symptoms such as impaired judgment, amnesia, and anxiety." Yet, he also insists he thought the 2005 documents "were being executed to put everything into a trust to protect the Parties' children in case the Parties died." He additionally maintains he did not intend to change the character of his IRA and annuity from separate to community property, and that he wanted both of those assets "left out of the Trust."

While there is abundant evidence that Thompson had a serious alcohol problem in 2005 and that Grace knew of it, there was also evidence, as the trial court recounted, that Thompson was functional on a daily basis, knew what he was doing when he signed the 2005 documents, and was not unfairly or unduly coerced by Grace. For example, Thompson continued to run his consulting business and engaged in daily affairs without difficulty. He was also able to take care of his grandson. Notably, Thompson did not present any testimony by a medical expert as to his physical and mental condition at the time. There was also evidence Thompson was actively engaged in the preparation of the 2005 documentation, including communicating directly with Massarweh about the handling of certain assets. There was also evidence Massarweh consulted with both parties about the documents and went over each of the documents before Thompson and Grace signed them.

Thompson next focuses on actions by Grace, which he claims shows her undue influence over him. He points to her insistence that the premarital agreement be revoked before she would reconcile and asserts she "knew, in his alcoholic and depressed state, that he would sign anything she [] put in front of him." He also points to her request that their marriage be kept confidential, claiming "[t]here would be no legitimate reason to keep her conduct a secret unless Respondent was trying to get Appellant to sign documents that would give her an advantage over Appellant." He additionally asserts that Grace's 2008 attempt to move some of the community assets into a separate trust in her own name evidences undue influence. And he similarly maintains statements she made in 2008 to her son (by way of notes to him on her will), show that she married Thompson solely for financial security, further evidencing undue influence on her part.[6]

[6] Grace's will had several handwritten notations on it, including two purportedly written by her in 2008 and directed to her son. These two notations read as follows: (1) "I didn't tell you this because in my heart I was not married, but for financial security for myself, you + Wayne to maintain this status until I could again be self-supporting after graduation from school," and (2) "Dick is a good man who really loves us all but I cannot fully place my trust in a person who abuses + is addicted to alcohol."

In short, the thrust of Thompson's attack on Grace is that she deliberately took advantage of his "alcoholic and depressed state" and married him in order to acquire ownership of his property.

However, in light of the entirety of the evidence, the trial court was not required to adopt Thompson's view of the case. For example, Grace explained why she thought it was wise to refrain from announcing the marriage: "If we withheld the fact that we got married, it was specifically from the children as they had witnessed some arguments between the two of us, and I didn't think they might be very happy with the news of our commitment until we reestablished ourselves and proved that we could do that happily together," and that "[o]ther than that," her family, Thompson's family, and her coworkers knew of her marriage. As the arbiter of credibility, the court was entitled to believe her testimony. (See *In re Marriage of Greenberg* (2011) 194 Cal.App.4th 1095, 1099 ["The trial court sits as trier of fact and it is called upon to determine that a witness is to be believed or not believed."].) As for Grace's effort in 2008 to transfer some of the couple's community property into a separate trust, the trial court found that, while it might evidence a breach of spousal fiduciary duties later in the marriage, it did not show that Thompson had been subject to undue influence three years earlier, when the 2005 documents were signed. Likewise, whatever her 2008 notes to her son might say about her motive in marrying Thompson, these notes do not establish that she exerted *undue influence* in obtaining marital status or in connection with the preparation and execution of the 2005 documentation. Again, the weight to be given to the 2008 evidence was a matter for the trial court to decide. (See *Ibid.* [" 'The trier of fact is the sole judge of the credibility and weight of the evidence. . . .' "].)

Thompson additionally contends Massarweh's testimony shows that Grace exerted undue influence in connection with the 2005 documentation. He points out Grace had a prior relationship with Massarweh and asserts Massarweh, himself, did not understand the legal significance of the documents he prepared because, had he done so, he would have sent the parties to another attorney. He also complains Massarweh did not remember "putting the 'right to consult independent legal counsel' into the [2005

documents]," and there could have been no reason not to do so "unless Respondent was trying to get Appellant to sign documents that would give her an advantage over [him]."

But what Massarweh actually testified to was that he had "no opinion" on what to call the agreement that revoked the premarital agreement. The trial court then *sustained* an objection to questions asking Massarweh what he understood portions of that document to mean. The trial court was also correct in sustaining the objection as "[w]hether [Massarweh] understood it or not is not relevant." (See *In re Marriage of Simundza* (2004) 121 Cal.App.4th 1513, 1518 [subjective or undisclosed understanding or intent not relevant to parties' objective intent].) Furthermore, most of Massarweh's testimony consisted of no-recollection responses. For example, he had "no recollection whatsoever about any of the documents [he had] prepared" for the parties. Nor could he recall whether he had "general procedures that [he] follow[s] as a matter of course when the parties that come to [him] . . . are not independently represented." He likewise could not remember which party he represented first or if he even represented "one of them before" he represented the other. Thus, the trial court understandably made no reference to Massarweh's testimony in finding no undue influence.

In sum, Thompson is essentially rearguing the evidence on appeal, quarreling with the trial court's credibility determinations and the weight it gave to the evidence. He has not met his burden on appeal to show that no substantial evidence supports the trial court's finding that Grace met her burden to show she exercised no undue influence on Thompson in connection with the 2005 documentation.

Right to Reimbursement

Thompson additionally maintains, assuming the 2005 documentation is enforceable, that he is statutorily entitled to reimbursement for the separate property he contributed to the community in accordance with section 2640. We agree with Thompson on this point, and therefore reverse and remand for further proceedings on statutory reimbursement.

The right to reimbursement for contributions of separate property has its genesis in a long line of cases, culminating in *In re Marriage of Lucas* (1980) 27 Cal.3d 808. These

cases " 'precluded recognition of the separate property contribution of one of the parties to the acquisition of community property, unless the party could show an agreement between the spouses to the effect that the contribution was not intended to be a gift.' " (*In re Marriage of Walrath* (1998) 17 Cal.4th 907, 914 (*Walrath*).)

The Legislature reversed this state of affairs by enacting former Civil Code section 4800.2, now Family Code section 2640. (*Walrath, supra*, 17 Cal.4th at p. 914; *In re Marriage of Perkal* (1988) 203 Cal.App.3d 1198, 1202 (*Perkal*) [the Legislature "[a]pparently . . . concluded it was fairer to the contributing spouse to permit reimbursement for separate property contributions upon dissolution of marriage"].)

Section 2640, subdivision (b) thus provides, in pertinent part: "In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source."[7]

Under section 2640, then, " 'the tables are turned so that the separate property interest is now preserved unless the right to reimbursement is waived in writing.' " (*Perkal, supra*, 203 Cal.App.3d at p. 1202, italics omitted.) Section 2460 " 'encourages married persons to freely and without reservation contribute their separate property assets to benefit the community, and alleviates the need for spouses to negotiate with each other during marriage regarding continuing reimbursement rights. . . . [S]ection 2640 protects the general expectations of most people in marriage, i.e., that spouses will be reimbursed for significant monetary contributions to the community should the community dissolve.' " (*In re Marriage of Carpenter* (2002) 100 Cal.App.4th 424, 429 (*Carpenter*), quoting *Walrath, supra*, 17 Cal.4th at p. 919.)

[7] Contributions expressly include down payments and payments for improvements. (§ 2640, subd. (a).)

" 'Waiver [of section 2640 reimbursement rights] requires a voluntary act, knowingly done, with sufficient awareness of the relevant circumstances and likely consequences. [Citation.] There must be actual or constructive knowledge of the existence of the right to which the person is entitled. [Citation.]' [Citation.] There must be '. . . an actual intention to relinquish it or conduct so inconsistent with the intent to enforce that right in question as to induce a reasonable belief that it has been relinquished.' " (*Perkal, supra,* 203 Cal.App.3d at p. 1203; *Carpenter, supra,* 100 Cal.App.4th at pp. 428–429.)

Accordingly, an agreement transmuting separate property into community property does not, in and of itself, waive a contributing spouse's statutory right to reimbursement unless it includes additional language that expressly waives or "has the effect" of waiving that right. (See *In re Marriage of Holtemann* (2008) 166 Cal.App.4th 1166, 1175; see also *Carpenter, supra,* 100 Cal.App.4th at p. 427 [premarital agreement stating property would be deemed to be community property, quitclaim deed transferring title to husband and wife as community property, and mortgage payments made with community funds did not, collectively, have the "effect" of waiving statutory right to reimbursement].) Indeed, even if a quitclaim deed transferring separate property to both spouses declares the transfer is a "gift" to the community, that does not constitute a waiver of the contributing spouse's right to contribution on subsequent dissolution of the marriage. (*Carpenter,* at p. 429.)

However, "section 2640 does not require the magic words 'I waive reimbursement' "; it requires only a writing that has the "effect of a waiver." (*Carpenter, supra,* 100 Cal.App.4th at p. 427.)

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' " (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.) Here, the provisions of the 2005 documents are undisputed, and therefore whether

Thompson waived his statutory right to contribution is a question of law subject to de novo review. (See *Ammerman v. Callender* (2016) 245 Cal.App.4th 1058, 1072 [where interpretation of document depends solely on its language and not on conflicting extrinsic evidence, meaning of document is a question of law subject to de novo review].)[8]

The trial court explained why it concluded the 2005 documents had the "effect of a waiver" as follows: The court first pointed out that the premarital agreement "was very specific, and in the exhibits that were attached itemized the separate property of each party and was also very specific as to the down payment Mr. Thompson made on the Lafayette residence, that that's his separate property." The court then turned to the post-marital revocation agreement and found it contained the "critical language"—namely, that Thompson now held "the former assets contained in that premarital free and discharged . . . of all the terms and provisions contained in such agreement and are no longer considered as separate property." The court did not see "any other interpretation to that language about being free and discharged of all the terms and provisions except to . . . mean that the property is community for all purposes, and it retains no separate property character, period." Further, "[t]here could have been many ways to draft this revocation of the premarital agreement that preserved reimbursement rights," but the document did not do so. For example, the agreement could have stated, "we hold the assets contained in the premarital free and discharged and they're not considered separate property but there'll be reimbursement for separate property contributions."

What the trial court's ruling amounted to, however, was a finding of an iron-clad transmutation agreement—that is, Thompson and Grace clearly and unequivocally

---

[8] While Grace urges us to apply the substantial evidence standard of review, neither of the cases she cites in support is on point. *In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1057–1058, concerned whether the spouse claiming reimbursement met his burden to *trace* what appeared to be community property to a separate property source. While the court in *In re Marriage of Kahan* (1985) 174 Cal.App.3d 63, 66, 71–72, recited the substantial evidence standard at the outset of its legal discussion, when it eventually addressed the issue of waiver, it simply held the wife's execution of a joint tenancy deed did not constitute a waiver of her right to reimbursement.

transmuted any separate property, and specifically Thompson's separate property, into community property. What the court failed to appreciate was that no matter how clearly the parties intended that their property would henceforth be considered community property, such intention, alone, did not have the "effect" of waiving Thompson's statutory right to reimbursement for the separate property he contributed to the community. (See *In re Marriage of Weaver* (2005) 127 Cal.App.4th 858, 865 ["even if property held in joint tenancy loses its separate property characterization under section 2581, section 2640 provides a right to reimbursement upon dissolution for the spouse who contributed separate property to the acquisition of property held in joint title, absent a written waiver of the right to reimbursement"].) Furthermore, in commenting that the parties could have added language expressly preserving the right to reimbursement, the trial court had it exactly backwards. No language is required to *preserve* the right to reimbursement; rather, express language is only required to *waive* that right.

In her respondent's brief, Grace emphasizes the same aspects of the premarital agreement and the post-marital revocation agreement that led the trial court to conclude that the revocation agreement had the "effect of a waiver" of Thompson's statutory right to reimbursement. In so doing, she too overlooks that manifest intent to transmute separate property into community property does not waive a contributor's right to reimbursement.

Grace points out the three principal cases Thompson cites on appeal—*In re Marriage of Bonvino* (2015) 241 Cal.App.4th 1411 (*Bonvino*), *Perkal*, *surpa*, 203 Cal.App.3d 1198, and *In re Marriage of Witt* (1987) 197 Cal.App.3d 103—are the same cases he cited in the trial court, and she maintains they are distinguishable.

In *Bonvino*, the former husband owned substantial separate property prior to the marriage, including a home in Long Beach. After the marriage, the couple purchased a home in Westlake. The down payment for the Westlake home came from the husband's separate property, title was taken in the husband's name, and the deed of trust securing the mortgage on the property was based of the husband's income. When the Long Beach home was sold, the proceeds, which were the husband's separate property, were used to

retire the loan on the Westlake home. (*Bonvino, supra*, 241 Cal.App.4th at pp. 1418, 1420.) The trial court ruled (a) the Westlake home was community property in its entirety because it had been acquired during the parties' marriage and (b) the husband had a section 2640 claim to reimbursement of his separate property contributions to its purchase. (*Id.* at pp. 1420–1421.)

The Court of Appeal reversed, concluding the Westlake home was both separate and community property. Although the property was acquired with separate and community property funds, title was taken in the husband's name as his separate property. (*Bonvino, supra*, 241 Cal.App.4th at pp. 1430, 1434.) The court then pointed out "the transmutation provisions of *section 852* must be satisfied to change the character of separate property to community property before the reimbursement provisions of *section 2640* apply," (italics added) and "[n]one of the documents . . . satisfied the requirements of *section 852* to effect a valid transmutation" of the Westlake home into community property. (*Id.* at pp. 1432, 1434, italics omitted.) To the contrary, all of the evidence showed the husband had intended to maintain the separate character of the property, except the fact that the home was purchased during the parties' marriage and the wife's testimony of an oral promise. (*Id.* at pp. 1430, 1434.) Accordingly, the appellate court reversed and remanded for the trial court to "calculate the separate and community interests in the Westlake Village property." (*Id.* at pp. 1434–1435.) On remand, of course, there would be no reimbursement issue, as the husband's separate property interests had remained intact. Thus, we agree *Bonvino* provides no assistance to Thompson.

In *Perkal*, the former husband executed a grant deed that stated, in part, " '*For A Gift*, [husband] does hereby GRANT to [himself] and [wife], husband and wife AS JOINT TENANTS. . . .' " (*Perkal, supra*, 203 Cal.App.3d at p. 1200.) The trial court ruled the husband was entitled to reimbursement for the value of the home as of the date it was contributed to the community. (*Id.* at p. 1202 & fn. 4.) Among the issues the Court of Appeal addressed was whether the "gift" language in the deed constituted a "sufficient written waiver of the reimbursement right" under section 2640. Like the trial

court, the appellate court concluded it did not, pointing out that the husband testified he had used the "gift" language to "negate the payment of a documentary transfer tax and to obviate the possibility of reassessment" of the home's value for property tax purposes, and there was no evidence to the contrary. (*Id.* at pp. 1202–1203.) While the husband's intent might not have been "laudable," said the court, his explanation of the word choice was credible and the language was insufficient to waive his right to reimbursement. (*Id.* at p. 1203.) Accordingly, the appellate court affirmed the husband's entitlement to reimbursement. (*Id*. at p. 1204.)

In *Witt*, the former wife had, before her marriage, owned a farm valued at over $800,000, which she subsequently contributed to the community but without a waiver of her right to recover the value of the equity she contributed. When the marriage dissolved, the farm was valued at only $300,000. (*Witt, supra*, 197 Cal.App.3d at p. 105.) Thus, the trial court's reimbursement order resulted in her recovering the farm in its entirety given the drop-in value. (*Ibid*.) The former husband claimed former Civil Code section 4800.2, now Family Code section 2640, created only a presumption that there was no gift of the value to the community in the absence of a written waiver, and that the wife's acknowledgement that she intended to make a gift to the community overcame that presumption. (*Witt*, at p. 107.) The Court of Appeal disagreed, concluding the statute "creates a substantive right of reimbursement in the contributing spouse which can be relinquished only by an express written waiver." (*Id.* at p. 108.) Accordingly, the appellate court affirmed the wife's entitlement to reimbursement.

As Grace points out, *Perkal* and *Witt* involved different facts, as do *In re Marriage of Lange* (2002) 102 Cal.App.4th 360 (*Lange*) and *Carpenter, supra,* 100 Cal.App.4th at page 424, which she also distinguishes.[9] However, the fundamental legal principles

[9] In *Lange*, the former wife used separate funds to pay the majority of the cost of acquiring the couple's residence, held in joint tenancy. (*Lange, supra*, 102 Cal.App.4th at p. 362.) Eventually, the former husband executed a "note" secured by a deed of trust on the residence, for the amounts paid by wife. Husband made no payment on the note, resulting in a substantial amount of accrued "interest." (*Ibid.*) After separating and commencing a dissolution proceeding, the wife sought to foreclose on the deed of trust.

employed in these cases are not in dispute, and for the reasons we have discussed, these principles establish that, while Thompson unquestionably transmuted his separate property to community property, he did not also waive his right to reimbursement under section 2640.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings to determine the amount of reimbursement to which Thompson is entitled under section 2640.[10] Each party to bear their own costs on appeal.

(*Ibid.*) The trial court ruled the note and deed of trust had benefitted the wife and therefore were presumed to have been obtained through undue influence. (*Id.* at p. 363.) The wife appealed, claiming the note and deed of trust constituted a waiver of and a substitute for her statutory right to reimbursement. (*Ibid*.) The Court of Appeal affirmed the trial court's finding wife had not dispelled the presumption of undue influence and that the note and deed of trust did not constitute a waiver of the statutory right to reimbursement. (*Id.* at pp. 364–365 [section 2640, subdivision (b) requires a " 'written waiver' " of statutory reimbursement rights or a writing that " 'has the effect of a waiver' "].)

In *Carpenter*, as we have already observed, the fact the former husband signed a premarital agreement stating a residence he would be purchasing with separate funds would be community property and then executed a quitclaim deed transferring the property to himself and his wife as community property did not constitute a waiver of his statutory right to reimbursement. (*Carpenter, supra,* 100 Cal.App.4th at pp. 427–429.)

[10] Given our disposition, we need not, and do not, address Thompson's claim that he was not allowed to fully present his case as to the amount of reimbursement he is owed. Since remand is necessary, he will have an opportunity to fully present his case on that issue upon return to the trial court.

_____
Banke, J.

We concur:

_____
Humes, P.J.

_____
Margulies, J.

A150045, *Grace v. Thompson*